UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

CASTRO VALLEY ANIMAL HOSPITAL, INC. **and** **CHRISTINA ARIANNA PADILLA, an Individual** **and** **AKILAH WILLIAMS, an Individual**	**Cases 32-CA-251642** **32-CA-254220**

RESPONDENT CASTRO VALLEY ANIMAL HOSPITAL, INC.'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by,

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I. INTRODUCTION

With an answering brief that is nearly four times the length of the opening brief to which it ostensibly responds, the Office of the General Counsel (hereafter the "General Counsel") violates the Board's Rules and Regulations and offers a virtual carbon copy of its Post-Hearing Brief to the Administrative Law Judge, instead of a focused discussion of the issues that Respondent raised in its exceptions and brief. The General Counsel merely replicates the ALJ's mischaracterization and misapplication of the standard for protected concerted activity, and buries its unsuccessful attempt to address the pertinent issues in a superfluous relitigation of the entire case from beginning to end. Because the ALJ wrongly concluded that the Charging Parties engaged in protected concerted activity, the Board should set aside the ALJ's decision and dismiss the Consolidated Complaint against Respondent.

II. ARGUMENT

A. The General Counsel's Answering Brief Violates the Board's Rules and Regulations

The Board's Rules and Regulations state that "[t]he answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question." 29 CFR § 102.46(b)(2). The General Counsel's answering brief does not comply with these requirements. In its exceptions and supporting brief, Respondent did not address every element of the claims asserted or every component of the ALJ's decision, nor did it offer a comprehensive discussion of all of the facts of the case. Rather, Respondent focused narrowly, in a brief of just over 13 pages, on the dispositive error in the ALJ's decision: the faulty determination that the Charging Parties engaged in protected concerted activity under the law. But the General Counsel's answering brief did not limit itself to the "questions raised in the

exceptions and in the brief in support," instead rehashing the entire case, and primarily matters that are not raised in Respondent's papers, in a massive 48-page brief that is a near-verbatim duplication of its Post-Hearing Brief. As such, the General Counsel has failed to provide a meaningful response to Respondent's arguments, forcing Respondent and the Board to wade through pages and pages of irrelevant discussion in order to find any pertinent material. If the applicable rules are to have any meaning, the Board should disregard or strike the answering brief.

B. The ALJ Erred in Determining that the Complainants Engaged in Protected Concerted Activity

One of the obvious prerequisites for a finding that an employee was punished for engaging in protected concerted activity is that the employee, in fact, engaged in such activity. Without that element, there is no case and any other facts and law are irrelevant.

As Respondent has explained in its exceptions and opening brief, these Charging Parties did not engage in protected concerted activity. The definition of concertedness "encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 886-887 (1986) (*"Meyers II"*) (emphasis added). In *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), the Board held that an employee who was discharged for complaining about not being tipped was not "seeking to initiate or induce group action," and that "[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity." *Id.* at *31 (emphasis added). Rather, the employee must have been "seeking to initiate, induce or prepare for group action." *Id*. (emphasis added). Respondent's exceptions and brief set forth in detail the genuine facts, including the Charging Parties' own admissions, showing that they never made any "truly group complaints" nor were they seeking "group

action" (not to mention that they conceded that they believed they were terminated for reasons other than having supposedly engaged in concerted activity).

The General Counsel fails to meaningfully address these realities, instead echoing the fatally flawed reasoning the ALJ employed and conspicuously resorting to the same conclusions without the facts to support them – beginning with the initial alleged communications between the two Charging Parties. While the General Counsel now attempts to characterize those discussions as "nascent concerted activities that develop[ed] into group action" (Answering Brief, at 27), not only is this an admission that these communications were not "concerted activities" or "group action," but even the ALJ did not believe that they were, stating that they "may not be considered to be protected concerted activity for mutual aid or protection as there is no evidence at that time that the employees had a goal of seeking to improve the terms and conditions of employment." Decision, at 21:5-8. The General Counsel then makes the same mistake that the ALJ did: concluding without evidence that the subsequent conversations with other co-workers somehow crossed over the line into concerted activity or a call to "group action." Just because the General Counsel says so does not make it true. All it does is note that these individuals shared their personal complaints with other workers. Not one word in the record supports a conclusion that they were seeking to vindicate the rights of other employees or to initiate action as a group. While the General Counsel attempts furiously to explain away the *Alstate* case, its holding remains that making a statement in a group setting or with other employees present does not make it concerted activity. Fatally lacking in this case is any indication that Charging Parties intended anything other than personal, individual complaints about their own situations.

Every attempt the General Counsel makes to convert individual behavior into "concerted activity" fails. For example, it mentions Padilla's comments to co-workers about the alleged unfairness of Williams' termination and of not receiving lunch breaks or overtime (Answering Brief, at 29), but this does nothing to suggest an intention of group activity. The General Counsel never explains why Padilla's discussions with Williams about the overtime and lunch breaks were not concerted activity, but the same conversations with others were. The same goes for Padilla's alleged refusal to sign the "Staff Note" and her purported attempt to discuss lunches and overtime with Dr. Brar (*Id.*); there is no indication that she was doing this for anyone but herself.

The error the General Counsel makes is assuming the concertedness of the activity based merely on the subject matter of the topics mentioned. It claims that the Charging Parties made statements "related to shared working conditions established by and within the control of Respondent" and that therefore those statements must reflect concerted, group action. (Answering Brief, at 31.) This is wrong. The test is not what the subject of the communication is – and *Alstate* definitively establishes this. In that case, there was a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work assignment, and a gripe about the assignment by an employee. Those subjects could theoretically be deemed "related to shared working conditions" as work assignments could affect more than just the one complaining individual. But the Board did not base its determination on the subject matter of the communication; rather, it held that there were no facts that "would support an inference that an individual employee was seeking to initiate or induce group action." The same is true here; there is no evidence supporting an inference that Charging Parties did anything with the intent of inducing <u>group</u> action. Indeed, while not dispositive, the Board cannot ignore the fact that other

than the Charging Parties, no other employees expressed concerns or complaints about the issues that the Charging Parties supposedly raised. This strongly dictates against a finding of group action.

The General Counsel asserts that "inducing or preparing for group action does not have to be stated explicitly when employees communicate and a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions." (Answering Brief, at 32.) It then jumps to the conclusion that the "totality of circumstances" demonstrates group activity. But all it offers is the fact that the Charging Parties made statements in the presence of other employees. As the law makes clear, that is not enough. The "totality of the circumstances" here is that Charging Parties initially had conversations with each other that the ALJ acknowledged were not concerted, and that they then raised the same issues in the presence of other employees. This does nothing to show that they intended actual group action or that they were discussing the issues as they may have related to someone other than themselves. There is no evidence that they had the intent to bring forth the issues on a group basis. The General Counsel could have elicited such evidence from the Charging Parties, but it did not.

In fact, the totality of the circumstances shows the opposite of what the General Counsel claims it does. For example, as the ALJ acknowledged, Williams "complained to Swart that she [Williams] was irritated because she [Williams] never receives a lunch break when she [Williams] works." Decision, at 7:28-30 (emphasis added). By its own plain language, this complaint is strictly personal and reflects no intention whatsoever to bring forth a concern on behalf of anyone but herself. Similarly, Padilla testified that the primary motivating factor for her termination was her refusal to sign the alleged "Staff Note" purporting to state that

Respondent's employees had been given sufficient time for their meal breaks. There is no evidence that she was part of a group that refused to sign, or that she raised issues about the document jointly with other employees, or that she did anything other than decline to sign the document solely on her own. Again, the General Counsel cannot transform this individual conduct into group action with a conclusory invocation of "totality of the circumstances."

With its brief, the General Counsel seeks to rewrite the definition of protected concerted activity. Gone would be any need to demonstrate that the complaining party actually intended to engage in or initiate group (concerted) action. Rather, the General Counsel believes that as long as an employee brings up an issue in front of other co-workers that might have some kind of general application to the workplace, protected concerted activity has occurred. If that is true, then the term "concerted" has no meaning. The Board should unequivocally reject the General Counsel's effort to redefine this key principle of American labor law.

C. Respondent's Request for Oral Argument Is Proper and Should Be Granted

The General Counsel claims that Respondent's request for oral argument should be denied because Respondent did not offer any "factual or legal authority" to support the request, and because there is "nothing novel or complex" about the issues presented. The General Counsel cites no rule, statute or case establishing such standards as to whether the Board should hear oral argument on exceptions. The Board's Rules and Regulations are silent on this subject; they merely state that "[a] party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions." 29 CFR § 102.46(g). Respondent made such a request. In fact, assuming the Board elects to consider the General Counsel's brief at all, this case is especially well-suited for oral argument, as the General Counsel should be required to actually address the relevant issues, not bury or

sidestep them in a grossly overlong brief. If anything, the fact that the General Counsel submitted a 48-page answering brief (nearly the maximum of 50 pages) in response to an opening brief of only about 13 pages strongly suggests that at least the General Counsel believes there must be some kind of complexity to the issues that required such a disproportionately lengthy response.

III. CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Decision of the Administrative Law Judge be set aside and that the Board dismiss all allegations in the Consolidated Complaint.

Date: October 6, 2020

Respectfully Submitted,

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STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

At the time of service, I was over 18 years of age and not a party to the action. My business address is 333 Bush Street, Suite 1100, San Francisco, CA 94104-2872. I am employed in the office of the attorney at whose direction the service was made.

On October 6, 2020, I served the following document(s): **RESPONDENT CASTRO VALLEY ANIMAL HOSPITAL, INC.'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

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The document(s) were served on the above individuals by the following means:

☒ (BY U.S. MAIL) I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.

In addition, I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

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☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) I caused the documents to be sent from e-mail address berenice.barragan@lewisbrisbois.com to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on October 6, 2020, at Antioch, California.

Berenice Barragan